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No. 90-584

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,
Petitioner,
vs.
BYRON GIZONI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the United States Court of Appeals for the Ninth Circuit err in deciding that Plaintiff was entitled to a jury trial on his status as a Jones Act seaman where Plaintiff, a ship repairman employed by a shipyard, was covered by the Longshore Act and where the District Court had determined that Plaintiff: 1) did not work aboard a vessel in navigation; 2) was not permanently assigned to any vessel in navigation; and 3) did not aid in the navigation of any vessel;

II. What is the proper test for seaman's status pursuant to the Jones Act and general maritime law;

III. Are employees who are in occupations specifically covered by the Longshore Act nonetheless entitled to a jury trial to determine their status as Jones Act seamen;

IV. Can the issue of seaman's status be decided as a matter of law;

V. Is *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940), still good law in light of the circuits' consistent departure from that decision; and

VI. In light of the need to preserve the resources of the Court, should this case be consolidated with a case involving similar issues already before this Court, *Wilander v. McDermott Intern., Inc.*, 887 F.2d 88 (5th Cir. 1989), *cert. granted*, ___ U.S. ___, 110 S.Ct. 3212 (1990), in order to obtain a ruling that would clarify the seaman's status issue?

LIST OF PARTIES

The following are the parties to this proceeding:

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Plaintiff-Respondent

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

DECISION BELOW 1

JURISDICTION 2

STATUTES PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 4

FACTUAL DISCUSSION 5

ARGUMENT 7

IMPORTANCE OF CASE 7

THE CURRENT STATE OF THE LAW 16

NINTH CIRCUIT ERROR IN LIGHT OF THE LAW OF THE CIRCUIT AND THE SUPREME COURT 20

CONCLUSION 23

TABLE OF AUTHORITIES
Cases

PAGE(S)

Baker v. Pacific Far East Lines, Inc., 451 F.Supp. 84 (N.D. Cal. 1978) 13, 17

Bennett v. Perini Corporation, 510 F.2d 114 (1st Cir. 1975) 17

Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984) 9, 14

Buna v. Pacific Far East Line, Inc., 441 F.Supp. 1360 (N.D. Cal. 1977) 20

Carusco v. Sterling Yacht & Shipbuilders, Inc., 828 F.2d 14 (11th Cir. 1987) 19

Chesapeake and Ohio Railway Co. v. Schwalb, ___ U.S. ___, 110 S.Ct. 381 (1989) 21

Craig v. M/V PEACOCK, 760 F.2d 953 (9th Cir. 1985) . . 20

Crooks v. United States, 459 F.2d 631 (9th Cir. 1972) 12

Estate of Wenzel v. Seaward Marine Services, Inc., 709 F.2d 1326 (9th Cir. 1983) 14, 17, 19, 20, 22

Garret v. Dean Shark Drilling Co., Inc., 799 F.2d 1007 (5th Cir. 1986) 23

Hed v. Duncanson-Harrelson Co., 7 BRBS 821 (1978), aff'd *sub nom*. Duncanson-Harrelson Co. v. Director, OWCP, 644 F.2d 827 (9th Cir. 1981) 18

Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985) 21

PAGE(S)

International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926) 16

Jacob v. New York, 315 U.S. 752 (1942) 12

Johnson v. John F. Beasley Const. Co., 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985) . . . 19

McDermott, Inc. v. Boudreaux, 679 F.2d 452 (5th Cir. 1982) 18

McIntosh v. Parkhill-Goodloe Co., Inc., 4 BRBS 3 (1976), *aff'd mem.*, 550 F.2d 1283 (5th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978) 18

Miller v. Patton-Tully Transp. Co., Inc., 851 F.2d 202 (8th Cir. 1988) 17

Moore Drydock Co. v. Pillsbury, 100 F.2d 245 (9th Cir. 1938) 22

Noack v. American Steamship Company, 491 F.2d 937 (6th Cir. 1974) 19

Offshore Company v. Robison, 266 F.2d 769 (5th Cir. 1959) 17, 18, 23

Omar v. Sea-Land Services, Inc., 813 F.2d 986 (9th Cir. 1987) 20

Pennsylvania R. Co. v. O'Roarke, 344 U.S. 334 (1953) 11, 21

Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988) 11, 20, 21, 23

Salgado v. M.J. Rudolph Corp., 514 F.2d 750 (2nd Cir. 1975) 19

Simko v. C&C Marine Maintenance Co., 594 F.2d 960 (3rd Cir. 1979), *cert. denied*, 444 U.S. 833 (1979) 19

Simms v. Valley Line Co., 709 F.2d 409, (5th Cir. 1983) . . 11

Soucie v. Trautwein Brothers, 275 Cal. App. 2d 20 (1969) 17, 20

South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940) 13, 14, 20, 21, 23

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 10

Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980) . . 10, 17

Thibodeaux v. Torch, Inc., 858 F.2d 1048 (5th Cir. 1988) 13

Whittington v. Sewer Construction Co., Inc., 541 F.2d 427 (4th Cir. 1976) 19

Wilander v. McDermott Intern., Inc., 887 F.2d 88 (5th Cir. 1989), *cert. granted*, ___ U.S. ___, 110 S.Ct. 3212 (1990) 9

Statutes and Rules

28 U.S.C. § 2101(c) 2
28 U.S.C. § 1254(1) 2
33 U.S.C. § 905(a) 3, 4, 15
33 U.S.C. § 902(3)(G) 2, 9, 11
33 U.S.C. § 914(d) 9
33 U.S.C. §§ 901-950 (Longshore and Harbor Workers' Compensation Act) . . . . . *passim*
42 U.S.C. § 249 12
46 U.S.C. § 688 (The Jones Act) . . . . . *passim*
46 U.S.C. § 688(a) 2
California Government Code §§ 68600, *et seq.* (Trial Court Delay Reduction Act of 1986) 11

Miscellaneous

62 Cong. Rec. 7754 (1922) 16

Bull, *Seaman Status Applied: A Practice Guide To Status Determination*, 1 U.S.F. Maritime Law Journal 43 (1989) 11, 15, 22

Culp, *Fixing the Federal Courts*, ABA Journal, June 1990, page 63 13

H.R. Rep. No. 639, 67th Cong., 2d Sess. 9 (1922) 16

Kaufman, *Crisis in the Courts*, California Lawyer, August 1990, page 28 13

Norris, *The Law Of Maritime Personal Injuries*, Vol. 1, § 13 (3rd ed. 1975) 12

Report of the Federal Courts Study Committee (April 2, 1990) Part II, Chapter 3, p. 62 7

S.Rep. No. 1125, 92d Cong., 2d Sess. 9-10 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 6 (1972); *reprinted in* U.S. Code Cong. & Admin. News, 4703 8

S. Rep. No. 94, 67th Cong., 1st Sess. 1 (1921) 16

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PETITION FOR WRIT OF CERTIORARI

DECISION BELOW

The Decision of the United States Court of Appeals for the Ninth Circuit, reported at 909 F.2d 385 (9th Cir. 1990), reversed and remanded the decision of the United States District Court for the Southern District of California. The District Court had granted the motion of Southwest Marine for summary judgment on the grounds that Plaintiff is a ship repairman. The District Court had reasoned that Plaintiff's occupation as a ship repairman established coverage under the Longshore Act[1] and precluded coverage under the Jones Act.[2] The District Court further determined that Plaintiff had failed to satisfy as a matter of law any of the three elements necessary for establishing seaman status under the Jones Act, as required by the Ninth Circuit's three prong test.

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[1]Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, hereinafter "Longshore Act" or "LHWCA".

[2]The Jones Act, 46 U.S.C. § 688.

JURISDICTION

This petition seeks review of the judgment of the United States Court of Appeals for the Ninth Circuit, entered on July 24, 1990. Consequently, jurisdiction is appropriate pursuant to 28 U.S.C. § 1254(1). This Petition for Writ of Certiorari was timely filed pursuant to 28 U.S.C. § 2101(c).

STATUTES PRESENTED FOR REVIEW

The Jones Act, 46 U.S.C. § 688(a):

> (a) Application of Railway Employee Statutes; Jurisdiction.
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3)(G):

> (3) The term "employee" means any person engaged in maritime employment, including any

> longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include --
>
> (G) a master or member of a crew of any vessel; . . .

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a):

> The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4.

STATEMENT OF THE CASE

On April 6, 1987, Byron Gizoni (hereinafter "Gizoni") was working as a rigger for Southwest Marine, Inc. (hereinafter "Southwest Marine"). Gizoni alleges that he stepped into a hole and injured his foot while walking on the surface of a floating platform. The floating platform was secured to a floating drydock at Southwest Marine's shipyard where a naval vessel was undergoing repairs.

Gizoni received workers' compensation benefits from Southwest Marine pursuant to the Longshore Act.[3] Subsequently, Gizoni filed a formal claim for benefits pursuant to the LHWCA. Nonetheless, on September 30, 1987, Gizoni filed suit against his employer, Southwest Marine, pursuant to the Jones Act and alleged, among other things, that he was a seaman and injured as a result of the negligence of his employer.

Southwest Marine filed its *Answer to Complaint* on February 4, 1988, alleging, among other defenses, that Gizoni was not a seaman for purposes of the Jones Act, and further that his Jones Act claim against Southwest Marine is barred by the exclusivity provisions of the LHWCA.[4]

On June 7, 1988, Southwest Marine filed its *Notice of Motion and Motion for Summary Judgment*, asserting the above defenses. In support thereof, Southwest Marine filed a *Memorandum of Points and Authorities In Support of Motion for Summary Judgment, Declaration of Allan Ovrom, Declaration of John Vitzthum, Declaration of David Bechtel, Declaration of John H.*

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[3]Southwest Marine paid for medical treatment on behalf of Gizoni in the amount of $3,239.56 and provided Longshore disability compensation payments to Gizoni in the amount of $12,368.44.

[4]"The liability of an employer prescribed in section 904 of this Title shall be exclusive and in place of all other liability of such employer to the employee . . . ." 33 U.S.C. § 905(a).

West, Declaration of Robert Mitchell, and *Declaration of Paul K. Witherspoon*. The declarations submitted by Gizoni and Southwest Marine described Gizoni's job duties in detail.

An attachment to the declarations included an Employee's Claim for Compensation, United States Department of Labor, Office of Workers' Compensation Programs (OWCP), Form LS-203. That form was filed by Gizoni with the United States Department of Labor, OWCP, to obtain further compensation benefits pursuant to the LHWCA.

Oral argument was heard before the District Court on July 5, 1988. The Court filed its Order Granting Motion for Summary Judgment on September 16, 1988.

On September 16, 1988, Gizoni filed a Notice of Appeal of the District Court judgment to the United States Court of Appeals for the Ninth Circuit. On or about February 28, 1989, Gizoni submitted his brief to the court. On May 22, 1989, Southwest Marine and amicus curiae, consisting largely of maritime employers, filed their briefs. The parties argued before the Ninth Circuit on March 9, 1990. On July 24, 1990, the Ninth Circuit filed its decision which reversed the judgment of the District Court.

FACTUAL DISCUSSION

Southwest Marine operates a ship repair facility in San Diego, California. Southwest Marine provides ship repair services to ocean-going vessels owned by the United States Navy and commercial vessel owners.

In connection with Southwest Marine's ship repair activities, it owns several floating platforms which are used at Southwest Marine's shipyard. Southwest Marine uses floating platforms to position tools, equipment and supplies alongside vessels during repairs. The platforms are used to hold anchor chains, anchors, rudders, propellers and shafts removed from or installed on vessels at Southwest Marine's shipyard. One floating platform holds a

sandblasting facility and is generally maintained at one location at the Southwest Marine shipyard.

Many of the floating platforms are simply used to provide additional work space at Southwest Marine's shipyard. Southwest Marine's floating platforms do not have means of self-propulsion or steering, raked bows, navigation lights, or crew facilities of any type. Virtually every employee of Southwest Marine has walked across or worked on a floating platform during his employment due to the nature of the ship repair business.

Gizoni worked as a rigger and rigger foreman during his employment with Southwest Marine. He was under the direct supervision of the superintendent of the rigging department, John West. Gizoni's duties as a rigger foreman required him to supervise and participate in the movement of equipment, materials, supplies, and vessel components onto and off of vessels repaired at Southwest Marine's shipyard.

Gizoni was never assigned to any vessel and never worked aboard vessels except to perform specific duties relating to the ship repair work that his employer was performing for the vessel owner. Gizoni had no duties relating to the navigation of any vessel.

Riggers occasionally perform line handling functions when Southwest Marine's floating platforms are moved from place to place in the shipyard. The participation by riggers in line handling is limited to receiving lines passed to the platform by the ship's crew and placing those lines over the bits on the platform. Gizoni's participation in line handling functions consumed less than one percent of his total work time.

Prior to April 6, 1987, a floating platform was secured to the apron of Southwest Marine's floating drydock, and to the rear of a Navy vessel which was in the shipyard for repair. The platform had been placed in that position in anticipation of repair work to be performed on the rudder of the Navy vessel.

Gizoni alleges that shortly after reporting for work on April 6, 1987, he walked onto the floating platform and was injured when his foot fell through a hole in the floating platform. As set out above, Gizoni has filed a Longshore claim and has been provided medical and compensation benefits by Southwest Marine pursuant to the LHWCA.

ARGUMENT

IMPORTANCE OF CASE

This case is of paramount importance to Southwest Marine, and indeed to every employer who employs ship repairmen, ship builders, stevedores or other employees specifically covered by the Longshore Act. The importance of the case rests on its practical effect. Virtually every shipyard, ship repair yard, stevedoring outfit and other waterfront employer must now procure two entirely different types of insurance for each and every one of its employees.

Furthermore, the state of the law since the Gizoni decision makes it possible that an employee could be awarded benefits under both the LHWCA and the Jones Act. The employer bears the cost of administering and defending those inconsistent claims and the courts of this country are forced to utilize limited judicial resources to address those inconsistent claims.[5]

That burden on employers flies in the face of the intent behind the 1972 amendments to the Longshore Act. As a result of the 1972 amendments, civil actions for unseaworthiness, formerly

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[5]In the *Report of the Federal Courts Study Committee*, it was noted that in 1987 and 1988 FELA and Jones Act cases together accounted for about five percent of all federal civil trials and about eight percent of all federal civil jury trials. *Report of the Federal Courts Study Committee* (April 2, 1990) Part II, Chapter 3, p. 62. Should the Ninth Circuit's decision in this matter stand, those numbers will surely increase.

available to all maritime workers, were taken away from longshore and harbor workers. Congress instructed that land-based maritime workers were to be treated as other land based workers and that only "seamen" were to be treated differently:

> [t]he seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. *The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel* . . . [t]he purpose of the amendment is to place an employee injured aboard a vessel in the same position he would be if injured in non-maritime employment ashore . . . and not endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called. . . .[6] [Emphasis Supplied.]

Thus, allowing land-based maritime workers to proceed with seamen's personal injury claims (Jones Act claims) against their employers is simply inconsistent with the rationale for precluding unseaworthiness claims by such land-based maritime workers.

The Court is therefore asked to enunciate the standard by which the maritime industry and the courts can determine whether a particular worker is deemed a longshoreman or harbor worker

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[6]S.Rep. No. 1125, 92d Cong., 2d Sess. 9-10 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 6 (1972); *reprinted in* U.S. Code Cong. & Admin. News, 4703.

subject to the provisions of the LHWCA[7] *or* a seaman capable of suing his employer pursuant to the Jones Act[8] and general maritime law. That issue is of paramount importance to all maritime employers, employees and related businesses because of the need to quickly and efficiently determine whether a particular employee falls under the LHWCA or the Jones Act.[9]

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[7]It is well settled that the Jones Act and the LHWCA are mutually exclusive. *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 243 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984).

[8]The Court recently accepted certiorari in the case of *Wilander v. McDermott Intern., Inc.*, 887 F.2d 88 (5th Cir. 1989), *cert. granted*, ___ U.S. ___, 110 S.Ct. 3212 (1990), which concerns similar issues addressed by the Fifth Circuit. The present case is different, however, in that the plaintiff in *Wilander* was *not* covered by the LHWCA. He was a paint foreman working on a fixed platform *overseas* and was thus not covered by any American worker's compensation law. *Id.* at 89. The issues presented in the present case, more common than those presented in *Wilander*, have been the source of great confusion. The *Wilander* case is the first case on the issue of seaman's status that the Court has agreed to address in well over 20 years. Petitioner suggests that the instant case would be an excellent companion case to the *Wilander* case and would provide the Court with the opportunity to resolve at one time the widest range of issues relating to Jones Act coverage cases.

[9]Indeed, continued confusion over whether an employee is covered by the LHWCA or the Jones Act could prompt many employers to simply controvert Longshore compensation payments on the grounds that the employee is excluded from LHWCA coverage as a member of a crew of a vessel. *See*, 33 U.S.C. §§ 902(3)(G), 914(d). That would be contrary to one of the primary reasons behind the LHWCA, that is, assuring prompt and voluntary compensation and medical treatment to injured maritime employees for work-related injuries when they are perhaps most in

(continued...)

The uncertainty of the law in this area has created an unreasonable economic burden on an industry which is already troubled by financial problems associated with foreign competition and overregulation. The decision of the Ninth Circuit threatens to undermine one of the prime purposes of the LHWCA,[10] which is to provide a prompt and expeditious remedy for work-related injuries to those maritime workers thought by Congress to work in an area in which neither the Jones Act or state workers' compensation acts may provide coverage.[11]

The current state of the law has made it possible for a number of plaintiffs, similarly situated to Gizoni, to initially collect generous benefits under the LHWCA without regard to their own negligence, the lack of negligence of their employers, or any other fault concept. Those employees are then able to sue their employers for general damages pursuant to the Jones Act or the general maritime law by alleging seaman status.[12]

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[9](...continued)
need of assistance. In addition, continued confusion would require most shipyard employers to carry double coverage -- LHWCA and Jones Act -- and thus require the industry to bear additional costs when that industry is already burdened by tremendous costs.

[10]It should be noted that in California alone several shipyards have gone out of business due in part to foreign competition and in part to the rising cost of providing LHWCA coverage, along with litigation costs. It is anticipated that if that situation is allowed to continue, many more yards may be lost. Clearly, the loss of jobs and income to foreign competition, and the loss of a strategic national security-related resource, is not in the national interest.

[11]*See, Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980), *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

[12]Some commentators have suggested that counsel for plaintiffs may even have an "obligation" to pursue seaman's status, and at (continued...)

That result encourages maritime employees and employers alike to engage in "claimsmenship," rather than voluntary resolution of disputes. As an example, if an employer anticipates a civil suit alleging seaman status, the employer may refrain from voluntary payment of LHWCA benefits, prior to a "judicial" determination of the employee's status, on the grounds that the employee may be excluded from LHWCA coverage as a member of a crew of a vessel.[13]

As recognized by the California Legislature, "judicial" determinations are not always prompt.[14] Consequently, when an employee is most in need of LHWCA benefits, such benefits may be controverted if there is an issue of LHWCA coverage due to ambiguities as to the employee's seamen's status.[15] Likewise, employees may be encouraged to accept voluntary payments

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[12](...continued)
the same time attempt to preserve LHWCA rights in the event the seaman's claim fails. The contingency fees available under the Jones Act encourage such action. *See*, Bull, *Seaman Status Applied: A Practice Guide To Status Determination*, 1 U.S.F. Maritime Law Journal 43, 113 (1989).

[13]Under the LHWCA, members of a crew of a vessel *are excluded* from LHWCA coverage. 33 U.S.C. § 902(3)(G). However, an administrative determination by an administrative law judge or the Benefits Review Board of the U.S. Department of Labor regarding an employee's status may not prevent a later contrary finding in the civil courts. *See, Simms v. Valley Line Co.*, 709 F.2d 409, 413, n.6 (5th Cir. 1983).

[14]Trial Court Delay Reduction Act of 1986; Cal. Gov't Code §§ 68600 *et seq.*

[15]The seamen's status test is generally regarded as similar, if not equivalent, to the test for exemption from the Longshore Act for masters and members of crews of a vessel. *Pennsylvania R. Co. v. O'Roarke*, 344 U.S. 334, 337-338 (1953); *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 983 (5th Cir. 1987).

pursuant to the LHWCA or make a claim for such benefits and thereafter file a Jones Act complaint against their employer.

Nevertheless, seaman's claims do not involve "no fault" benefits which are payable pursuant to the LHWCA. Proof of negligence is essential to recovery under the Jones Act.[16] Although seamen have also traditionally been entitled to medical treatment at their employer's expense[17] as well as a "subsistence allowance" ("maintenance") for compensation for room and board normally received aboard their seagoing vessel, those benefits are not compensation for injuries or illness.[18]

One can readily conclude that employers, no longer assured the reciprocal benefit of a bar against a Jones Act claim by an employee, would be inclined to treat as seamen employees who are injured through no fault of the employers. Consequently, the employees that Congress intended to benefit would be denied their LHWCA benefits due to their proximity to boats and the

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[16]*Jacob v. New York*, 315 U.S. 752, 755 (1942).

[17]Until recently, medical treatment costs were paid through the United States Public Health Service Hospitals. 42 U.S.C. § 249.

[18]Several cases have suggested that maritime employees who maintain homes year-round (like harbor workers and longshoremen) need not be provided with the lodging component of their maintenance and cure benefit. Similarly, cases have suggested that seamen who are not provided board by their employers are not entitled to any component of the "maintenance" benefit associated with board. Consequently, seamen who live ashore, maintain housing ashore and eat ashore at their own cost, rather than at their employers' expense, are not entitled to maintenance. *Crooks v. United States*, 459 F.2d 631, 634 (9th Cir. 1972); *see* Norris, *The Law Of Maritime Personal Injuries*, Vol. 1, § 13 (3rd ed. 1975).

waterfront (unless they vigorously litigated their status).[19] That is the exact problem that Congress intended to resolve for those employees in 1927 by enacting the LHWCA, and again by amending the LHWCA in 1972 and 1984.

The lack of a clear delineation between Jones Act plaintiffs and Longshore Act claimants opens the door for abuse.[20] That is obviously contrary to the intent of Congress, which was to create a system in which employees would be covered and compensated under the Longshore Act or the Jones Act, *but not both*. Indeed, the Supreme Court, as well as the lower courts, have acknowledged that employees should not be covered by both the Jones Act and Longshore Act.[21]

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[19]In essence, LHWCA benefits which otherwise would have been quickly provided to employees would be delayed and eventually shared with attorneys who litigated the Jones Act claims for those employees.

[20]The confusion over which employees are Jones Act seamen versus land-based maritime workers has also depleted judicial resources at a time when the courts are already overburdened and lengthy delays for court time are common. Culp, *Fixing the Federal Courts*, ABA Journal, June 1990, page 63; Kaufman, *Crisis in the Courts*, California Lawyer, August 1990, page 28.

[21]*See, e.g., South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 256 (1940); *Thibodeaux v. Torch, Inc.*, 858 F.2d 1048, 1050 (5th Cir. 1988); *Baker v. Pacific Far East Lines, Inc.*, 451 F.Supp. 84, 89 (N.D. Cal. 1978).

However, *Wenzel v. Seaward Marine*,[22] upon which the Ninth Circuit relied, has encouraged many employees and their attorneys to simultaneously prosecute LHWCA and seaman's claims for the same injury. The decision of the Ninth Circuit in the instant case would assure plaintiffs that they would not be stopped short of a jury, even based on the flimsiest of facts. That is precisely the type of mischief which Congress attempted to remedy through its amendments to the LHWCA.

Indeed, the LHWCA must be interpreted with an eye toward the mischief to be resolved.[23] In the present case, the Ninth Circuit's decision places an unreasonable burden on the harbor marine and ship repair industry, not to mention the burden on the courts because of the frequent need to use court time. That burden includes double insurance costs, double administration costs and double defense costs. That is despite the fact that both programs are costly in and of themselves, and despite a specific legislative intent to avoid creating such an overlap.[24] The current situation only benefits maritime attorneys who have an incentive to litigate the seaman's status issue.

The intolerable situation noted above has created a class of workers who have the best of both worlds, to the detriment of the stevedoring, ship repair and harbor marine industry. That class consists of workers who are clearly not Jones Act seamen

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[22]*Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326 (9th Cir. 1983). In *Wenzel*, the Ninth Circuit found that a diver involved in scraping the hull of a naval vessel was entitled to have his Jones Act seaman's status determined by a jury. However, the vessel to which he claimed assignment was essentially a small underwater vacuum cleaner used for cleaning the hulls of naval vessels. Indeed, the vacuum cleaner was not even in the water on the day of the injury. Thus, the flimsiest of facts enabled the plaintiff in that case to get to the jury.

[23]*South Chicago Coal, supra*, 309 U.S. at 259.

[24]*Bertrand, supra*, 700 F.2d at 243.

precluded from LHWCA benefits and also not true longshore and harbor workers precluded from generous seamen's benefits. Those employees fall into the overlap between the Jones Act and the LHWCA. In many cases, those employees can obtain LHWCA remedies from the day of injury while at the same time litigating their seaman's status. They enjoy the security of the "no-fault" LHWCA remedies while rolling the dice, at little or no cost, for seaman's remedies not otherwise available to the other land-based LHWCA workers.[25]

Southwest Marine requests that the Court make every effort to effectuate the legislative intents behind the LHWCA and the Jones Act. It therefore requests that the Court grant certiorari and articulate uniform and dependable criteria[26] for seaman's status which can be used to: (1) assure that all employers have obtained correct and sufficient insurance coverage for employees other than those who are members of the crew of a vessel; (2) assure that those same employees promptly receive the compensation benefits to which they are entitled under the LHWCA, without the need for litigation to determine the issue of employee status as a seaman or employee covered by the LHWCA; and (3) assure that employers, who have traded away many employer liability defenses and who have undertaken the burden of paying injured workers extremely generous "no fault" disability benefits pursuant to the LHWCA, receive what they were given in exchange, i.e. immunity from tort liability.[27]

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[25]1 U.S.F. Maritime Law Journal 43, 115.

[26]The criteria should take in account the intent of both Acts and resolve the question of who is covered by the LHWCA and who is covered by the Jones Act, or at the very least ensure that the same test is applied in both the Longshore and Jones Act forums.

[27]*See* 33 U.S.C. § 905(a). The mere fact that Gizoni was able to file this suit, which has cost Southwest Marine significant attorneys' fees and costs in defense after receiving benefits pursuant to the LHWCA, underscores the importance of the issues addressed in this petition.

THE CURRENT STATE OF THE LAW

The Jones Act is an employer liability statute. It permits recovery by a *seaman* against his employer for injuries sustained in the course of employment occasioned by the employer's negligence. Southwest Marine maintains that Gizoni is simply not eligible to recover under the Jones Act because he is not a seaman. The Jones Act provides in relevant part:

> Any *seaman* who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . . . [46 U.S.C. § 688.] [Emphasis supplied.]

The term "seaman", however, is not defined by the Jones Act. Instead, *Congress left it to the courts to fashion a definition and the result has been that different circuit courts have utilized different definitions.*[28] In 1926, the United States Supreme Court held that the term "seaman" was broad enough to include longshoremen who were employed in maritime service customarily rendered by the ship's crew.[29]

However, Congress apparently did not agree that the Jones Act should have such broad application. Consequently, months after the *Haverty* decision, Congress passed the LHWCA to provide a separate, comprehensive compensation scheme for maritime workers who were not "members of a crew of any vessel." Indeed, members of a crew of a vessel were specifically excluded

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[28]The legislative history of the Jones Act suggests that, despite what the courts have fashioned, Congress intended that Jones Act remedies be limited to those workers whose jobs entail the particular hardships only experienced by those who work at sea. *See* H.R. Rep. No. 639, 67th Cong., 2d Sess. 9 (1922); S. Rep. No. 94, 67th Cong., 1st Sess. 1 (1921); 62 Cong. Rec. 7754 (1922).

[29]*International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926).

from LHWCA coverage. Thus, one of the prime purposes of the LHWCA was to provide a compensation scheme for employees who fell through the cracks and were not covered by the Jones Act or state workers' compensation acts.[30]

Congress' gift to the courts of the responsibility for determining a definition of seaman combined with the lack of recent guidance from the Court has created an intolerable situation for the shipping industry. That is, the circuits apply different tests for determining who is a Jones Act seaman. In fact, there may be a difference in the test used, even in the same federal circuit, for determining Jones Act seamen and members of a crew of a vessel excluded by the LHWCA. For example, in California the federal courts follow *Wenzel v. Seaward Marine Services*, *supra*, and the California state courts follow the Fifth Circuit's *Offshore Company v. Robison* test.[31] Thus, an employee may be a seaman if he chooses to file in state court and a harbor worker if he files in federal court.[32]

The First,[33] Fifth[34] and Eighth[35] Circuits apply versions of the "special purpose" test (also known as the "two prong" test),

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[30]*Sun Ship*, *supra*, 447 U.S. at 715.

[31]*Soucie v. Trautwein Brothers*, 275 Cal. App. 2d 20, 25 (1969), *citing Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959).

[32]*See*, *Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1327 (9th Cir. 1983); *Baker v. Far East Lines, Inc.*, 451 F.Supp. 84, 87 (N.D. Cal. 1978); *Soucie*, *supra*, 275 Cal. App. 2d at 25.

[33]*Bennett v. Perini Corporation*, 510 F.2d 114, 116 (1st Cir. 1975).

[34]*Offshore Company*, *supra*, 266 F.2d at 769.

[35]*Miller v. Patton-Tully Transp. Co., Inc.*, 851 F.2d 202, 204 (8th Cir. 1988).

first announced in *Offshore Company v. Robison*. That test requires that the plaintiff be employed aboard a "vessel" or a special purpose vessel, "in navigation," that he perform a "substantial part" of his work on the "vessel," and that his duties "contribute to the function or mission" of the vessel. *Id.* Significantly, the Fifth Circuit test is *also* different from the test applied by the U.S. Department of Labor and courts when determining whether an employee is a member of a crew of a vessel pursuant to the LHWCA.[36] Indeed, the Fifth Circuit Jones Act test is different from the Fifth Circuit test for determining a member of a crew of a vessel.[37] Therefore, in California and in the First, Fifth and Eighth Circuits, it is possible for an employee to be both an employee covered by the LHWCA and a Jones Act seaman.

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[36]Compare, *Hed v. Duncanson-Harrelson Co.*, 7 BRBS 821 (1978), aff'd *sub nom. Duncanson-Harrelson Co. v. Director, OWCP*, 644 F.2d 827 (9th Cir. 1981); *McDermott, Inc. v. Boudreaux*, 679 F.2d 452 (5th Cir. 1982).

[37]*Compare, McDermott, supra*, 679 F.2d at 452; *McIntosh v. Parkhill-Goodloe Co., Inc.*, 4 BRBS 3 (1976), *aff'd mem.*, 550 F.2d 1283 (5th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978).

The Second,[38] Third,[39] Fourth,[40] Sixth,[41] Seventh,[42] Ninth[43] and Eleventh[44] Circuits generally follow a version of the "aid in navigation test" (also known as the "three prong" test). As applied by the Ninth Circuit in 1983, that test has the following three prongs:

> (1) The vessel on which the claimant was employed must be in navigation;
>
> (2) The claimant must have a more or less permanent connection with the vessel; and
>
> (3) The claimant must be aboard primarily to aid in navigation.[45]

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[38]*Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750, 755 (2nd Cir. 1975).

[39]*Simko v. C&C Marine Maintenance Co.*, 594 F.2d 960, 964 (3rd Cir. 1979), *cert. denied*, 444 U.S. 833 (1979).

[40]*Whittington v. Sewer Construction Co., Inc.*, 541 F.2d 427, 436 (4th Cir. 1976).

[41]*Noack v. American Steamship Company*, 491 F.2d 937, 939 (6th Cir. 1974).

[42]*Johnson v. John F. Beasley Const. Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

[43]*Wenzel, supra*, 709 F.2d at 1327.

[44]*Carusco v. Sterling Yacht & Shipbuilders, Inc.*, 828 F.2d 14, 15 (11th Cir. 1987).

[45]*Wenzel, supra*, 709 F.2d at 1327.

The Ninth Circuit has continued to cite the *Wenzel* decision as providing the proper test for seaman status in the Ninth Circuit.[46]

Under the Ninth Circuit's test, an employee must affirmatively prove *all* of the elements of the test to establish that he is a seaman, and the plaintiff's failure to establish even one of those elements requires a finding that the plaintiff is not a seaman as a matter of law.[47]

NINTH CIRCUIT ERROR IN LIGHT OF THE LAW OF THE CIRCUIT AND THE SUPREME COURT

A review of the Court's decision in *South Chicago Coal* and the Fifth Circuit's decision in *Pizzitolo v. Electro-Coal Transfer Corporation*[48] highlights the error of the Ninth Circuit in this case. In *South Chicago Coal*, the Court simply held that Jones Act seamen were "those employees on the vessel who are naturally and primarily on board to aid in navigation."[49] Clearly, under that simple test a harbor bound rigger employed by a ship repair company is not a Jones Act seaman.

In *Pizzitolo*, the Fifth Circuit followed the Supreme Court's lead in *South Chicago Coal* and announced a test which focuses on

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[46]*See e.g., Omar v. Sea-Land Services, Inc.*, 813 F.2d 986, 988 (9th Cir. 1987); *Craig v. M/V PEACOCK*, 760 F.2d 953, 956 (9th Cir. 1985). However, as noted above, the California superior courts have apparently adopted portions of the Fifth Circuit's test. *Compare, Wenzel, supra*, 709 F.2d at 1327; *Soucie, supra*, 275 Cal. App. 2d at 20.

[47]*Buna v. Pacific Far East Line, Inc.*, 441 F.Supp. 1360, 1366 (N.D. Cal. 1977).

[48]812 F.2d 977 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988).

[49]*South Chicago Coal, supra*, 309 U.S. at 260.

whether the employee is covered by the LHWCA.[50] The Fifth Circuit explained that the LHWCA "specifically covers any harbor worker, including a ship repairman . . . ," and that "[t]he language of the LHWCA thus strongly supports, indeed arguably demands, the conclusion that a harbor bound ship repairman is as a matter of law not a 'member of a crew' and thus not a Jones Act seaman."[51] That is the test that should have been followed by the Ninth Circuit. It is in line with the Court's reasoning in *South Chicago Coal* and consistent with the legislative intent behind the LHWCA, its amendments and the Jones Act.

However, the Ninth Circuit's error in this case is not simply based on the misapplication of its seaman's test. Instead, the court

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[50]The *Pizzitolo* test focuses on the employee's occupation, i.e., whether or not the employee is a ship repairman. That is consistent with the other rulings of the Court -- *Chesapeake and Ohio Railway Co. v. Schwalb*, ___ U.S. ___, 110 S.Ct. 381 (1989), *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), and *Pennsylvania Railroad Company v. O'Roarke*, 344 U.S. 334 (1953). In *Chesapeake*, the Court noted that:

> We also reiterated in *Herb's Welding v. Gray, supra*, that the maritime employment requirement as applied to land-based work other than longshoring and the other occupations named in § 902(3) is an occupational test focusing on loading and unloading. Those not involved in those functions do not have the benefit of the . . . [LHWCA]. [*Id.* at 385.]

As in *Chesapeake, Herb's Welding, O'Roarke* and *Pizzitolo*, Petitioner requests that the Court adopt a standard for determining seaman's status which focuses on the employee's occupation -- in this case -- a rigger and not a seaman.

[51]*Pizzitolo, supra*, 812 F.2d at 983.

completely abdicated application of any test.[52] Although the Ninth Circuit enunciated a test in *Wenzel* which is consistent with the tests set forth by the United States Supreme Court, the Ninth Circuit has refused to consider whether Gizoni was indeed a harbor worker, which includes a ship repairman, not eligible for consideration as a seaman.

In the instant case, Gizoni has argued that summary judgment is virtually never appropriate in a seaman's case since seamen status cannot be determined as a matter of law. However, the United States Supreme Court and the federal circuit courts have routinely disagreed. The Ninth Circuit nonetheless concluded that it was bound by the *Wenzel* decision and essentially agreed with Gizoni. However, there are not any decisions which support the proposition that seaman's status can never be determined as a

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[52]It is interesting to note just how far the Ninth Circuit has strayed. In *Moore Drydock Co. v. Pillsbury*, 100 F.2d 245 (9th Cir. 1938), the court noted that:

> A stevedore or longshoreman has no connection with the ship. He has not bound himself to its service. He does not serve as a member of its crew, but performs . . . a duty that formerly was ordinarily done by the crew, not upon the high sea, but at the ship's destination, minus the perils of the voyage. He does not undergo the hardships and dangers, nor does he surrender his personal rights and liberties that a seaman does in binding himself to the vessel . . . . [*Id.* at 247.]

Again, emphasis was placed on separating those who were the intended recipients of seaman's remedies from those who had no need of such special protection. *See*, 1 U.S.F. Maritime Law Journal 43, 67.

matter of law. Indeed, the normal summary judgment procedures remain applicable.[53]

Furthermore, the decision of the Ninth Circuit suggests that *any* shipyard worker or harbor worker is entitled to proceed to a jury trial on his seaman's claim. Consequently, the Congressional intent underlying the LHWCA has been disregarded due to the Ninth Circuit's refusal to apply a normal procedural device.

Until recently, no court has even suggested that the normal procedural devices, including summary judgment, do not apply to the seaman's status issue. As a result, maritime employers, such as shipyards and ship repair companies whose employees have for the most part been traditionally covered by the LHWCA, as well as the courts, now face a flood of Jones Act claims and litigation.

CONCLUSION

For the reasons set forth above, the Ninth Circuit's decision is inconsistent with the Congressional intent behind the LHWCA, the Jones Act, and the Court's opinions concerning seaman's status. As set out above, the Ninth Circuit decision in this case requires the shipping industry to obtain "dual insurance" (Longshore and Jones Act) for each employee and incur substantial costs. The shipping industry, already suffering financially, is in danger of collapsing under that burden. Consequently, a decision of the Court clarifying the test to be used for determining seaman's status is necessary to the continued viability of this country's strategic maritime industry, which clearly includes the shipbuilding and ship repair industries. Such a decision would also help to reduce the current strain on judicial resources which the constant relitigation of those issues has caused.

Petitioner therefore requests that the Court affirm its holding in *South Chicago Coal* by adopting the *Pizzitolo* test for seaman

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[53]*Garret v. Dean Shark Drilling Co., Inc.*, 799 F.2d 1007, 1009 (5th Cir. 1986); *Offshore Company*, *supra*, 266 F.2d at 778.

status -- a test that is both consistent with the intent of Congress and fair to both the shipping and maritime industry and its employees. The Ninth Circuit's decision to the contrary should be reversed.

Respectfully submitted,

LITTLER, MENDELSON,
FASTIFF & TICHY
A Professional Corporation
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By JAMES J. MCMULLEN, JR.

Attorneys for
Southwest Marine, Inc.

APPENDIX I

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BYRON GIZONI, Plaintiff, v. SOUTHWEST MARINE, INC., Defendant.	Civil No. 87-1424-GT(CM) ORDER FOR ENTRY OF SUMMARY JUDGMENT

The motion of defendant, SOUTHWEST MARINE, INC., for Summary Judgment on the basis that plaintiff is not a "seaman" entitled to bring an action pursuant to the Jones Act, or in the alternative, that plaintiff is a harbor worker and therefore precluded from bringing this action pursuant to the exclusive remedy provisions of the Longshoremen's and Harbor Workers' Compensation Act, came on regularly for hearing before this court in Courtroom One, on July 5, 1988, at 10:30 a.m. before the Honorable Gordon Thompson, Jr., Chief Judge. James J. McMullen, Jr. of Littler, Mendelson, Fastiff & Tichy appeared as attorney for defendant, and Preston Easley appeared as attorney for plaintiff.

After full consideration of all the evidence and Points and Authorities submitted by both parties, and oral arguments of counsel, the court finds that there is no triable issue of material fact and the defendant is entitled to judgment as a matter of law.

The findings of this court are based upon the ground that plaintiff was not a "seaman" entitled to bring an action pursuant to the Jones Act because defendant's floating platforms were not

"vessels in navigation" and plaintiff was not aboard such platforms to "aid in navigation," but to perform work as a ship repairman. Specifically, the court relied upon the case of Estate of Wenzel v. Seaward Marine Services, Inc., 709 F.2d 1326 (9th Cir. 1980) wherein the Ninth Circuit set out the three-prong test for determining seaman status in this circuit.

Further, plaintiff as a harbor worker, is precluded from bringing this action by the exclusive remedy provisions of the Longshoremen's and Harbor Workers' Compensation Act.

IT IS SO ORDERED.

Dated: SEP 14 1988

GORDON THOMPSON, JR., Chief Judge
United States District Court

Copies to:
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Byron Gizoni — JUDGMENT IN A CIVIL CASE

v.

Southwest Marine, Inc.

CASE NUMBER 87-1424-GT(CM)

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Summary judgment is entered on the basis that plaintiff is not a "seaman" entitled to bring action pursuant to the Jones Act. Judgment is in favor of the defendant.

9/16/88 — *Date*

WILLIAM W. LUDDY — *Clerk*

Tina R. Helart — *(By) Deputy Clerk*

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BYRON GIZONI, Plaintiff-Appellant, v. SOUTHWEST MARINE, INCORPORATED, Defendant-Appellee.	)	No. 88-6666 D.C. No. CV-87-1424-GT OPINION

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, District Judge, Presiding

Argued and Submitted
March 9, 1990 -- Pasadena, California

Filed July 24, 1990

Before: William C. Canby, Jr. and Edward Leavy,
Circuit Judges, and E. Dean Price,* District Judge.

Opinion by Judge Canby

*The Honorable E. Dean Price, United States District Judge for the Eastern District of California Sitting by Designation.

COUNSEL

Preston Easley, San Pedro, California, for the plaintiff-appellant.

James McMullen, Littler, Mendelson, Fastiff & Tichy, San Diego, California, for the defendant-appellee.

OPINION

CANBY, Circuit Judge:

Appellant Byron Gizoni appeals the district court's ruling on summary judgment that as a matter of law he is not a "seaman" under the Jones Act, 46 U.S.C. § 688, but a harbor worker precluded from recovering under the Jones Act by the exclusive remedy provision of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA"). We reverse and remand.

FACTS

Appellee Southwest Marine, Inc., operates a ship repair facility in San Diego, California. In connection with its ship repair activities, Southwest Marine owns several floating platforms. These platforms by themselves have no power, means of steering, navigation lights, navigation aids, or facilities for crew. They are moved about by tugboats, which position the platforms alongside vessels that are being repaired at berths or in dry dock at Southwest Marine's shipyard or at the nearby Naval Station. So placed, the platforms support workers engaged in ship repair, along with necessary materials and equipment. Those materials are equipment are usually loaded onto the platform before it is tugged into position.

Gizoni was a rigging foreman employed by Southwest Marine. In that capacity, Gizoni worked on the platforms supervising other riggers and riding the platforms as they were used to move equipment, materials, supplies, and vessel components around the shipyard and on to and off of vessels being repaired. Gizoni occasionally served as a lookout and gave maneuvering signals to the tugboat operator when the platforms were moved. He also received lines passed to the platforms by the ships' crews to secure the platforms.

Gizoni was injured when his foot broke through a thin wooden sheet covering a hole in the deck of a platform being used to

transport a rudder from the shipyard to a floating drydock. He suffered disabling leg and back injuries in the fall and is unable to work. Shortly thereafter, Gizoni made a claim for and received medical and compensation benefits from Southwest Marine pursuant to the LHWCA. Later, he filed suit against Southwest Marine under the Jones Act alleging that he was a seaman injured due to the negligence of his employer. Southwest Marine brought a motion for summary judgment asserting that Gizoni was not a "seaman" for purposes of the Jones Act and that this claim was barred by the exclusivity provisions of the LHWCA, 33 U.S.C. § 905(a). The district court granted the motion on both grounds.

STANDARD OF REVIEW

We review de novo a grant of summary judgment, *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir.) *cert. denied*, ___ U.S. ___ (1990). We uphold summary judgment where, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the district court correctly applied the relevant substantive law. *Judie v. Hamilton*, 873 F.2d 919, 920 (9th Cir. 1989).

ANALYSIS

A. Status as a Jones Act Seaman

Under the Jones Act, status as a "seaman" depends on three factors: (1) the vessel on which the claimant was employed must be in navigation; (2) the claimant must have a more or less permanent connection with the vessel; and (3) the claimant must be aboard primarily to aid in navigation. *Bullis v. Twentieth Century-Fox Film Corp.*, 474 F.2d 392, 393 (9th Cir. 1973)(the "*Bullis* test"). Gizoni first contends that the district court erred in ruling that he failed to satisfy this test as a matter of law. We agree.

Whether a claimant is a seaman is typically a question for the jury, where there is an evidentiary basis for such a finding. *Omar*

v. Sea-Land Service, Inc., 813 F.2d 986, 988 (9th Cir. 1987); *see also Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 374 (1957). "There is an 'evidentiary basis' for determining a plaintiff's status as a seaman when, for example, parties dispute whether the ship was in navigation or whether the employee was actually a member of the ship's crew." *Omar*, 813 F.2d at 988. These and other questions are in dispute in this case.

Moreover, we are bound to follow our decision in *Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326 (9th Cir. 1983), which controls here, Wenzel was a diver/tender employed by Seaward Marine Services to clean the hulls of Navy ships. The divers cleaned the hulls using hand-held scrapers and a SCAMP -- a submerged cleaning and maintenance platform. The SCAMP was a saucer-shaped unit 6 feet in diameter and 20 inches deep. It traveled underwater along the ship's hull and could be operated manually by divers. During one of his dives, Wenzel died of asphyxiation. He was not using the SCAMP at the time. His estate filed a Jones Act claim against Seaward. Seaward filed a motion for summary judgment arguing that Wenzel was a harbor worker, not a seaman, and the district court granted the motion. We reversed and remanded, concluding that Wenzel's status as a seaman under the *Bullis* test and whether the SCAMP was a vessel were each close questions of fact which should have been determined by the jury.

We see no reasonable basis for distinguishing this case from *Wenzel*. The SCAMP is no more clearly a vessel in navigation than are the platforms used by Southwest Marine. Nor was Wenzel's relationship with the SCAMP any more permanent than Gizoni's relationship with the platforms. Wenzel, who was not even using the SCAMP at the time of his death, did not aid in its navigation any more clearly than Gizoni aided in the navigation of the platforms. Thus, under *Wenzel*, the question whether Gizoni was a Jones Act seaman should have been put to a jury.

B. Exclusive Remedy Provision of the LHWCA

The district court's second basis for granting summary judgment was that Gizoni was a harbor worker precluded from suing under the Jones Act by Section 5(a) of the LHWCA. That section provides in part: "The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee. . . ." 33 U.S.C. § 905(a). Thus, an employee covered by the LHWCA is precluded by this provision from bringing any other cause of action, including a Jones Act claim, against an employer for injuries on the job. *See South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 256 (1940); *Arvidson v. Dillingham Corp.* 462 F.2d 1, 4 (9th Cir.), *cert. denied*, 409 U.S. 983 (1972).

The LHWCA described the class of workers covered by the statute as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include . . . a master or member of a crew of any vessel. . . .

33 U.S.C. § 902(3). Southwest marine contends that because Gizoni's work involves primarily ship repair, he is covered explicitly by the provisions of the LHWCA and, consequently, is precluded from bringing an action against Southwest marine under the Jones Act.

In *Petersen v. Chesapeake and Ohio Railway Co.*, 784 F.2d 732 (6th Cir. 1986), the Sixth Circuit addressed the question whether the LHWCA provides the sole remedy for a ship repairman injured as a result of his employer's negligence. The plaintiff in *Petersen* had brought a Jones Act claim against his employer to recover for injuries sustained as a result of his exposure to asbestos on the job. Petersen was a machinist who

repaired equipment and machinery on ferries. He did most of his work in dry dock but spent approximately thirty percent of his work time repairing car ferry engines while the ferries were sailing. After trial, the district court entered judgment on a jury verdict in favor of Petersen. On appeal, the employer argued that Petersen's sole remedy was under the LHWCA. The Sixth Circuit stated: "A plaintiff is not limited to the remedies available under the LHWCA unless he is unable to show that a genuine factual issue exists as to whether he was a seaman at the time of his injury." *Id.* at 739. Applying a three-part test identical to the *Bullis* test, the court concluded that there was enough evidence for the jury to conclude that Petersen was a Jones Act seaman. Thus, Petersen was not limited to the remedies available under the LHWCA despite the fact that his work consisted primarily of repairing ships in dry dock. *Id.*

We join the Sixth Circuit in rejecting the notion that any person whose work involves ship repair is necessarily restricted to coverage under the LHWCA. Whether an employee is covered by the LHWCA or the Jones Act should be determined by looking to the nature of the claimant's job title. Moreover, by its terms, the LHWCA does not cover "a master or member of a crew of any vessel." 33 U.S.C. § 902(3). The term "master or member of a crew" in the LHWCA is the equivalent of "seaman" in the Jones Act. *See Petersen*, 784 F.2d at 739; *see also McDermott, Inc. v. Boudreaux*, 679 F.2d 452, 455 (5th Cir. 1982); *Travelers Insurance Co. v. Belair*, 412 F.2d 297, 302 (1st Cir. 1969). Thus, Gizoni is covered by the LHWCA only if he is not a seaman. As we ruled earlier, the question whether Gizoni is a Jones Act seaman should have been presented to a jury. Accordingly, we reverse the order granting summary judgment and remand for a jury trial on the question of Gizoni's status and coverage under the compensation statutes.

REVERSED AND REMANDED.

APPENDIX III

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
GORDON THOMPSON, JR., JUDGE PRESIDING

BYRON GIZONI, Plaintiff,	Civil No. 87-1424-GT
v.	
SOUTHWEST MARINE, INC., Defendant.	SAN DIEGO, CALIFORNIA JULY 5, 1988

HEARING ON DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

APPEARANCES:

FOR THE PLAINTIFF:	Preston Easley, Esq. 150 West Seventh Street, Suite 203 San Pedro, California 90731
FOR THE DEFENDANT:	Littler, Mendelson, Fastiff & Tichy By: James J. McMullen, Jr., Esq. 701 B Street, Suite 300 San Diego, California 92101
COURT REPORTER:	Ann Butcher U.S. Courthouse, Department One 940 Front Street San Diego, California 92189

San Diego, California, Tuesday, July 5, 1988, 10:30 a.m.

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THE CLERK: No. 11 on calendar, Case No. 87-1424, Byron Gizoni versus Southwest Marine Incorporated, defendant's motion for summary judgment.

MR. EASLEY: Good morning, your honor. Preston Easley appearing for the plaintiff Byron Gizoni.

MR. McMULLEN: Good morning, your honor. Jim McMullen for Southwest Marine.

THE COURT: This is a motion by the defendant for summary judgment.

Does the Defendant have anything to add to their motion papers?

MR. McMULLEN: Yes, I do, your honor. Just very briefly.

The cases following *South Chicago Coal & Dock Co. versus Bassett* are the cases we wish to call the Court's attention to after the plaintiff's opposition, and specifically *Chicago Coal & Dock* involved a lighter vessel, it involved a crew member who was on the crew of that vessel pursuant to a Coast Guard inspection certificate. The master of that vessel came into court to testify that he was a necessary member of the crew according to the U.S. Coast Guard, and, nonetheless, because plaintiff facilitated the loading and unloading of coal aboard the larger vessels, he was found to be a longshoreman and, consequently, not entitled to bring the Jones Act action as a matter of law. In fact, there is an extensive cite at page 260 of that opinion in which they set forth exactly the status.

O'Roarke, we have an F.E.L.A. case, F.E.L.A. being incorporated in the Jones Act. And in that case, summary judgment granted by the trial court based upon the railroad worker going on to barges on navigable waters and consequently being covered by the Longshore Act, was overruled by the circuit court finding that this man was a member of the Railroad Union, he was a member -- he was indeed employed by a railroad, and he worked releasing brakes as he did in a shore side capacity, he worked essentially as a brakeman, nonetheless, the supreme court found that because he was facilitating the loading and offloading of railcars on to barges on navigable waters, he was covered by the Longshore Act and, consequently, could not bring his F.E.L.A. claim or his Jones Act claim.

The plaintiff suggests that the Ninth Circuit has ruled that you cannot have summary judgment on seaman status. And to support that proposition, he cites *Wenzel versus Seaward Marine Services*. Now *Wenzel* involves a very strange special purpose vessel. And in fact, the Ninth Circuit in the case immediately after, actually two years later, but the next seaman's case considered by the Ninth Circuit, found no seaman status as a matter of law. That's the case of *Craig versus M/V PEACOCK*, 760 Fed. 2d 953. This was a case in which they found that researchers could not, as a matter of law, be a seaman aboard the vessels that they were aboard. And in fact, that case is somewhat analogous to this case, as is *Buna* and *Baker* and the Ninth Circuit authority holding that people who use a vessel in order to supply some other trade, are not crew members aiding in navigation.

Now the plaintiff also attempts to establish the Ninth Circuit would not approve of the *Pizzitolo/Williams* line of cases in the Fifth Circuit. The *Williams* case being the one that says once the district court has determined that an employee is covered by the Longshore and Harbor Workers' Compensation Act, they need look no further; *Pizzitolo* being a little more detailed opinion which was prior to that.

Now that is entirely incorrect. In addition to the United States Supreme Court cases which I just cited, *O'Roarke* and *Chicago*

Coal upon which the Fifth Circuit relied, we have the case of *Arvidson*, which was decided by the Ninth Circuit in 1972. That case was a case in which the Ninth Circuit assumed, arguendo, that this employee was working aboard a vessel and doing the traditional work of a seaman. Nonetheless, because this employee -- and this is *Arvidson versus Dillingham Construction* -- nonetheless, the Ninth Circuit found that because he was covered by the Longshore and Harbor Workers' Compensation Act, he was barred from bringing the Jones Act. Now this again is prior to the passage of 1972 amendments; I mean, even though this is a '72 case, it dealt with prior to '72 law.

So now since 1972, we have the Congress saying, one, there is no more unseaworthiness cause of action for any maritime employee under the Longshore and Harbor Workers' Compensation Act, regardless of the owner of the vessel. And in 1984, they step in and say not only that, but a negligence cause of action enunciated in 905(b) -- 33 U.S. Code 905(b) of the Longshore and Harbor Workers' Act, does not apply to employees. In other words, there is no dual capacity.

Essentially, your honor, although we shifted our emphasis to this line of cases, to the *Pizzitolo* and the *Williams* line of cases, which go all the way back to *Chicago Coal* and accepted by the Ninth Circuit in '72, we still believe that consistent with *Baker* and *Buna* -- and by the way, *Baker* was approved by the Ninth Circuit in the 1984 opinion called *Samson*, which is cited in our reply memorandum, for the exact proposition that the exclusive remedy provisions, the Longshore and Harbor Workers' Compensation Act bar a claim by a harbor worker against his employer based upon the Jones Act.

Now putting aside that line of cases, we still believe a rigger who works aboard a square platform within the confines of a shipyard simply cannot be found to be a seaman as a matter of law. And that's the exact analysis that the Northern District of California used in the *Baker* and *Buna* case. In the *Baker* case they found that an employee who was assigned to a shore site gang who spent a great deal of time on barges was nonetheless a ship

repairman because he was shorebound; his supervisors were ashore, he went ashore to sleep, and was not permanently assigned to any vessels in navigation. In *Buna* they found a paint float that happens to move around to someone's ship repair facility does not become a vessel by the mere act that it's moving around the other vessels that are being repaired.

And so Southwest Marine submits that both under the *Pizzitolo* and *South Chicago Cole* line of cases, and under the three-prong test, plaintiff is not a seaman as a matter of law and summary judgment is proper.

THE COURT: Thank you, counsel.

Anything to add?

MR. EASLEY: Yes, sir.

First of all, the plaintiff in this case is not just a loader/unloader as the cases that Mr. McMullen referred to dealt with. The facts in this case are really overwhelming. There are some cases where somebody is a fundamentally land-based maritime worker and his connection with vessels, other than those being repaired, is sporadic to say the best.

That's not the situation here with Mr. Gizoni. Mr. Gizoni was a rigger foreman at Southwest Marine. Southwest Marine owns their own barges and their own floating cranes. He worked on those barges every single day. When the barges were moved around the harbor between Southwest Marine and the Navy base and various different locations where the work was being done, he rode the barge, he served as a lookout for the tugboat operator, he helped docking and undocking, the maneuvering of the barge. And really another connection he had with the barges is even beyond working on them and riding on them every day, and that is that Southwest Marine has a department that is called the facilities department that is in charge of all of the barges Southwest Marine; it owns its own tugs, barges, and cranes. And the facilities department is in charge of the barges. Mr. Gizoni

worked on the night shift, and on the night shift there is no facilities department. So on the night shift, the riggers are in charge of all the barges.

So I would say in this case he's connected with the barges three different ways; he works on them, he rides on them, he serves as a lookout, and he maintains them and is responsible for them during his entire shift.

I gave a lot of examples and hypotheticals in my opposition papers. And I want to say that tugs owned by shipyards are not vessels in navigation for Jones Act purposes, but tugs and barges owned by nonshipyards are. I want to say that a tug that is towing a barge down the Mississippi, people on the tug are seaman, the people in the barge aren't. They seem to be some fairly ridiculous distinctions that we have to make in that situation.

I brought a copy of the Longshore Act with me. The Longshore Act doesn't apply to this case. I realize Mr. McMullen cited a line of cases dealing with the Longshore Act. We don't feel we're governed by the Longshore Act. Mr. Gizoni is claiming seaman status in this case.

The very first page in the Longshore Act, which is 33 U.S. Code section 905 -- section 900 and it goes on. Section 2, paragraph 3, says, "the term employee means any person engaged in maritime employment, including any longshoreman or other person engaged in longshore operations, and any harbor worker, including a ship repairman, a shipbuilding, and shipbreaker, but such term does not include," and it has a long list of people that are excluded from the Longshore Act. And paragraph G says, "a master or member of a crew of any vessel." Now there is not a second sentence there that says, "unless the vessel is owned by the shipyard."

The shipyard employers seem to be looking for some type of vessel owner exclusion in this act that would eliminate anybody that works for them from claiming seaman status. And, frankly, I don't see such an exclusion in the Longshore Act. And I realize

that that argument has been made that if you work for a shipyard, you shouldn't be able to allege seaman status.

Now, I'll tell you where I see the difference. It's true that when shipyards were building ships in the seventies and eighties, guys would get hurt on the ships under construction and they would immediately claim that they were seamen on the ship being built. The Congress eliminated that type of cause of action. The 905(b) -- vessel under negligence, the 905(b) action Mr. McMullen referred to.

There are also situations where a vessel owner would bring a ship into a shipyard, turn it over to the shipyard, and the shipyard could be considered the owner pro hac vice in a legal sense, and longshoremen -- shipyard workers that were working on the vessel at that time were trying to claim negligence actions against the vessel, some presumably as seaman and some presumably as third-party actions. And that was eliminated.

I cited some remarks made in the Longshore Desk book which is published by the U.S. Department of Labor and which deals a lot with the congressional intent of the Longshore Act and the amendments. And you could see the part that I quoted there. Basically, try to destroy shipyard worker negligence actions against the employers for vessels under repair and vessels under construction. But if we're going to create a legal system where a shipyard can go out and buy its own tug boats and its own barges, and that's going to exclude any claim of seaman status by virtue of the ownership of the vessel, I think we're really missing the point on that.

Now I'd like to respond to a couple of other things.

In the *Wenzel* case, which I believe is the standard of seaman status in the Ninth Circuit, this diver worked with these little underwater scooters to clean vessel hulls and repair vessel hulls. He was arguably engaged in ship repair and enumerated employment under the Longshore Act. And the defendants prevailed on a summary judgment to get the seaman's status thing

thrown out, and the Ninth Circuit reinstated it saying it's a jury issue, it's an issue of fact.

Whether Mr. Gizoni is a harbor worker or whether he's a seaman, that's an issue of fact which is most properly decided by a jury. *Wenzel* upholds Gizoni's right to have that issue tried by a jury, and there is a long line of Supreme Court cases that do. And it's largely the thinking in the maritime legal community that this *Chicago Coal/Bassett* case has been overruled by subsequent Supreme Court cases on the seaman's status issue, and I have listed and explained all those cases in my opposition papers.

The defendant in this case is trying to get you to make a determination today as to whether Mr. Gizoni is covered under the Longshore Act or whether he's covered under the Jones Act. And I think that's an awfully tough ruling to make today, and I'll tell you why.

There was a case that was litigated before the Department of Labor last year called *Ryan versus Alaska Contractors*; these are administrative law judge hearings where people claim benefits under the Longshore Act. Mr. Ryan was a welder who worked on a barge offshore. This is the Outer Continental Shelf Land Act which is nothing more than the extension of the Longshore Act. He was a welder working on a barge up in the Ventura/Santa Barbara area, and he got hurt welding on the barge, and he claimed Longshore Act benefits. The judge ruled that because of his assignment to the barge, he was ineligible for the Longshore Act.

So just having Southwest Marine coming here and saying, "Hey, this gay *{sic}* can't be a seaman, he's eligible for Longshore Act benefits," from my point of view that's certainly presumptuous.

THE COURT: Well, it may be, but I think he's correct.

I think that he is entitled to summary judgment. I think the plaintiff is a harbor worker under the Longshoreman's Act. I do

not think that barge floats are vessels in navigation. Plaintiff is not aboard a vessel, the float -- the barge float for the purpose primarily in aid of navigation. I don't think he's entitled to bring his action of negligence under the Jones Act.

To acquire seaman status, he would have to be -- the vessel must be in navigation, and these are not in navigation. The claimant must be more or less permanently connected to the vessel, and he's not. The claimant must be aboard primarily in aid of navigation, and he's not, he's primarily aboard for the purpose of rigging, and that is not navigation.

I don't think the barge floats are vessels under the Jones Act either. Their structure and purpose is to facilitate the repair of other vessels. They do not have navigational aids, they do not have rigged bows, they do not have life boats or other lifesaving equipment, they do not have billows pumps, they do not have crew headquarters, they do not have registrations of vessels with the coast guard.

And, therefore, in my judgment they are just what they say they are, docks or barges from which there is a platform, from that platform there is a rigger, and the fact that it is -- the platform is afloat, does not make it navigable or in navigation.

So the judgment is for the defendant -- the summary judgment.

And I think there was something mentioned about sanctions. There are no sanctions to be ordered in this case.

That's all.

Prepare the order, please, Mr. McMullen.

MR. McMULLEN: Yes, your Honor, I will.

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